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IN THE

Supreme Court of the United States

October Term, 1965

No. 1220

JOE A. CUNNINGHAM,
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THOMAS GILBERT SHARPE, JR.
1010 EAST WASHINGTON
BROWNSVILLE, TEXAS
Attorney for Petitioner

HARDY, GALINDO & SHARPE
POST OFFICE BOX 2155
BROWNSVILLE, TEXAS
Of Counsel

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is included in the Appendix hereto, but is yet unprinted.

JURISDICTION

The judgement of the Court of Appeals was entered on the 23rd day of February, 1966 (Appendix B). Rehearing was denied on March 18, 1966 (Appendix C). The jurisdiction of this Court is invoked under 28 United States Code Section 1254 (1).

QUESTION PRESENTED

Whether the protection of the right not to testify in a criminal prosecution constitutes impeachment of the verdict of the Jury?

STATUTES INVOLVED

5th Amendment to the Constitution

" . . . nor shall be compelled in any criminal case to be a witness against himself, . . . "

3481 of Title 18, U.S.C.A.

"... all persons charged with the commission of offenses against the United States . . . the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

STATEMENT OF THE CASE

Petitioner was tried for assaulting an Immigration Officer. He was convicted on a trial before a jury. The alleged incident arose in a cotton field near Pharr, Texas. The officer came to check the laborers and petitioner advised him they had already been checked that morning. The officer did not believe petitioner at the time, though

he found out later that petitioner was speaking the truth. The altercation which gave rise to this prosecution transpired in the cotton field after the argument over the checking of the workers took place.

The case was submitted to the jury, and during their deliberations they discussed the fact that the defendant had failed to testify. This fact was established by an affidavit of one of the jurors (R. 339). The Trial Court admitted, for purposes of the record, that the jurors discussed petitioners failure to take the stand (R. 307). The trial Court refused to allow petitioner to examine said jurors, all of whom were in attendance at the time the motion for new trial was heard. (R. 291-307) Petitioner moved the Court to allow him to make a bill, but this motion was denied. (R. 293-300).

REASONS FOR GRANTING THE WRIT

There presently exists a hiatus in the Federal Law as to what constitutes impeachment of a jurors verdict and how you protect a substantive right which you have under the Constitution of the United States.

The Court below relied on five cases in its decision on this point. These cases are distinguishable, both on their facts and as guideline herein. They are:

McDonald V. Pless, 1915, 238 U.S. 264, a case involving an alleged quotient verdict. There was no definition of impeachment herein, nor was there a question raised regarding constitutional rights.

Hyde V. United States, 1912, 225 U.S. 347, a case involving an alleged bargaining between jurors and coercion by the Court.

Complete Auto Transit, Inc. V. Wayne Broyles Engineering Corp., 5th Cir., 1965, 351 F. 2D 478. This case involved an alleged quotient verdict.

Parsons V. United States, 5th Cir., 1951, 188 F. 2D 878. This case involved matters which transpired in the jury room that were not disclosed in the opinion of the Court.

Salibo V. United States, 5th Cir. 1931, 46 F. 2D 790. This case involved the discussion of the defendant's failure to take the stand, but the constitutional question was not raised by appellant.

The five foregoing cases do not in any manner define or delineate the meaning of impeachment of a verdict. There is no distinction drawn in them with regard to protection of substantive rights of the defendant. It is certain that a defendant can have his substantive rights jeopardized during the deliberations of the jury and that a statement by a juror may be used to show this improper or illegal conduct. **Southern Pacific Co. V. Haight** 9th Cir. 126 F. 2D 900, Cert. Den. 317 U.S. 676 (1942).

If petitioner has the right not to testify in a criminal prosecution, then the jury should not be able to discuss his failure to testify in arriving at a determination of guilt. If petitioner has no way to safeguard his privilege then he has a right without a remedy. The only way for petitioner to overcome the jury inferences is to testify, which would place the burden on him to take the stand.

The present status of the Federal Law offers this petitioner no remedy to protect his rights under the Fifth Amendment to the Constitution of the United States.

CONCLUSION

This Honorable Court should grant this application for writ of certiorari to provide for a method of protecting the substantive right of petitioner not to have to testify in his own behalf in a criminal prosecution, and to allow petitioner a new trial where his privilege is not recognized by the jurors.

PRAYER

Wherefore, premises considered, petitioner prays that this Honorable Court grant his application for writ of certiorari.

Respectfully submitted,

THOMAS GILBERT SHARPE, JR.
HARDY, GALINDO & SHARPE
1010 EAST WASHINGTON
BROWNSVILLE, TEXAS
POST OFFICE BOX 2155

Of Counsel for Petitioner

CERTIFICATE OF MAILING

I certify that a copy of this application was mailed to the Solicitor General of the United States on the 13th day of April, 1966 by posting same at Brownsville, Texas with good and sufficient postage and properly addressed.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22326

JOE A. CUNNINGHAM,
APPELLANT,

VERSUS

UNITED STATES OF AMERICA,
APPELLEE

Appeal from the United States District Court for the Southern District of Texas

Before Bell and Thornberry, Circuit Judges, and Fisher, District Judge.

Per Curiam: Appellant was convicted by a jury on a one-count indictment charging appellant with assaulting, impeding and interfering with an Officer of the Immigration and Naturalization Service, in violation of 18 U.S.C. 111. He asserts three grounds for reversal, none of which is meritorious.

Appellant's first contention involves an allegation of jury misconduct-namely, that the jurors discussed appellant's failure to testify in his own behalf. The affidavit of one juror was submitted to support the contention that this factor may have been considered by the jury in determining appellant's guilt.

The Trial Court refused to allow appellant's counsel to examine the jurors on this point. This ruling was correct, since the case fits within the well-settled general rule that a juror will not be heard to impeach his own verdict. The policy considerations underlying the rule are well stated in McDonald V. Pless, 1915, 238 U. S. 264, 59 L. Ed. 1300, 35 S. Ct. 783. See also Hyde V. United States, 1912, 225 U.S. 347, 56 L. Ed. 1114, 32, S. Ct. 793; Complete Auto Transit, Inc. V. Wayne Broyles Eng. Corp., 5th Cir. 1965, 351 F. 2D 478; Parsons V. United States, 5th Cir. 1951, 188 F. 2D 878; and Salibo V. United States, 5th Cir. 1931, 46 F. 2D 790.

The judgment is affirmed.

APPENDIX B

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;
On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 23, 1966

APPENDIX C

ON PETITION FOR REHEARING

Per Curiam: It is ordered that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1220

JOE A. CUNNINGHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of assaulting, impeding and interfering with an officer of the Immigration and Naturalization Service, in violation of 18 U.S.C. 111. He was sentenced to imprisonment for eighteen months, forty-five days of which was to be spent in jail, the balance to be suspended during probation for a period of five years. He was also fined $500 (R. 328, 331). The court of appeals affirmed per curiam (Pet. App. 1-2).

The evidence on behalf of the government was that, while an inspector for the Immigration Patrol was endeavoring to check the papers of Mexican laborers on petitioner's cotton farm, petitioner knowingly assaulted him, necessitating his hospitalization for three days (R. 1-86). Testimony on behalf of petitioner was given by three of his employees, who stated that the inspector started the fight (R. 135-195). Petitioner did not testify. Following the verdict, petitioner produced the affidavit of one of the jurors that the jury had disregarded the court's admonition not to consider petitioner's failure to testify in arriving at their verdict, and sought a hearing in which the jurors would be questioned as to this matter (R. 339, 341).[1] This court denied the motion (R. 342).

The court properly refused to conduct an inquiry as to the deliberations of the jury and the considerations which entered into their verdict. The rule against impeaching a verdict by the testimony of jurors is based upon the public policy against harassing jurors after their services have been ended and because of

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[1] The affidavit alleged (R. 339):

> During the course of the deliberations by the jury it was freely discussed among the jurors that the defendant had not taken the witness stand to testify in his behalf. One of the women jurors said, "He would have taken the stand and testified if all of the testimony against him were false."
>
> Numerous comments were made regarding the defendant's failure to take the stand. It appeared to me that the defendant's failure to take the stand hurt him in the eyes of the jury generally and that some of the jurors considered his failure to testify in determining his guilt.

the manifest possibilities of fraud and abuse if such a means of overturning verdicts were recognized. *McDonald* v. *Pless*, 238 U.S. 264; *Hyde* v. *United States*, 225 U.S. 347, 383-384; *Butler* v. *United States*, 317 F. 2d 249, 262 (C.A. 8), certiorari denied, *sub nom. Benedec* v. *United States*, 375 U.S. 836.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

May 1966.

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